Supreme Court, U.S.
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No. 85-416.

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

JOSEPH SCAGLIONE,
PETITIONER,

v.

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1395 AND AT & T TECHNOLOGIES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondent, Communications Workers of America, Local 1395 in Opposition.

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Questions Presented.

I. Should *DelCostello*, decided by this Court in 1983, establishing a six-month statute of limitations for actions by individuals against their unions and companies, be applied retroactively to bar a suit brought in 1977, when the appropriate statute of limitations was six years against companies and three years against unions?

II. Should the statute of limitations begin to run when the union has not informed its member that it has concluded its processing of the grievance?

III. Does a union owe a fiduciary obligation to its members which requires it to notify its members in writing that it has concluded the processing of a grievance, and of a right to bring suit for breach of the duty of fair representation?

IV. Whether the statute of limitations in a suit by an individual against the union should begin to run where the union is still pursuing the grievance.

V. When should the statute of limitations begin to run against a union for breach of the duty of fair representation?

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Opinions Below.

The opinion of the Court of Appeals is reported in *Scaglione* v. *Communications Workers of America, Local 1395,* 759 F.2d 201 (1st Cir. 1985). Otherwise, the statement of Petitioner identifying the opinions below is accurate.

Statutes and Rule Involved.

Aside from the statutes listed and reproduced in the Petition, Sup. Ct. R. 21.5 may be involved in the disposition of this Petition. The Rule provides as follows:

> The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Statement of the Case.

In addition to the Statement of the Case contained in the briefs of Respondent AT & T Technologies, Inc. ("the Company") and Petitioner ("Scaglione"), Respondent Communications Workers of America, Local 1395 ("the Union") adds the following:

Although the Complaint in this matter was filed on December 29, 1977, it was not served on the Union until April, 1979.

Reasons for Denying the Writ.

The only issue briefed by Petitioner is whether the Court of Appeals was correct in its retroactive application of this Court's decision in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), establishing a six-month statute of limitations for hybrid actions alleging a breach of contract by an Employer and a breach of the duty of fair representation by a Union. The issue of *Del-*

Costello's retroactivity is not one of general importance warranting this Court's consideration. Additionally, the decision below is consistent with Supreme Court precedent and the weight of authority of the Courts of Appeals. This instant petition does not raise any special or compelling issue requiring Supreme Court review.

A. *The Petition does Not Present Issues of General Importance Warranting This Court's Consideration.*

Petitioner himself unwittingly provides perhaps the strongest reason for not granting certiorari when he argues: "There are few of [*sic*] any suits in the country filed in 1977 alleging breach of the duty of fair representation which remains [*sic*] on the dockets." [Petition at 9.] In *Rice* v. *Sioux Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955) Justice Frankfurter counselled against granting discretionary review in just this sort of situation: "[W]e should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute."

The issue of the retroactive application of this Court's ruling in *DelCostello* is on the verge of becoming outmoded. With the passage of time, the number of pending cases brought prior to this Court's decision in *DelCostello* inexorably declines. Accordingly, the retroactivity question assumes ever decreasing significance as fewer and fewer cases remain on the dockets which present the issue. *Cf. Zemonick* v. *Consolidation Coal Company*, 762 F.2d 381, 389 (4th Cir. 1985) ("This problem will shortly go away, if it is not already gone.")

Manifestly, Petitioner's case is not one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). In these circumstances, since the retroactivity of *DelCostello* will

soon be of no practical consequence, certiorari should not be granted to resolve what is fast becoming merely an academic issue.

B. *The Holding Below is Consistent with Supreme Court Precedent and the Weight of Authority of the Courts of Appeals, and the Instant Petition Provides No Compelling Reason for Granting Review.*

Petitioner asserts that this Court's 1983 ruling in *DelCostello* should not be applied retroactively to cases in which the cause of action accrued before April 20, 1981, when the Supreme Court issued its decision in *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981). It is, however, a basic principle of our jurisprudence that a court is to apply the law in effect at the time it renders its decision. *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969). Accordingly, "retroactive application of judicial decisions is the rule, not the exception." *Simpson* v. *Director, Office of Workers' Compensation Programs*, 681 F.2d 81, 84 (1st Cir. 1982) *cert. denied*, 459 U.S. 1127 (1983).

Undoubtedly the greatest obstacle to petitioner's overcoming the strong presumption in favor of retroactivity is this Court's decision in *DelCostello* itself; for in that case the Court not only announced a new statute of limitations, but it also applied the time bar to extinguish the very claims before it.[1]

Since this Court in fact applied its *DelCostello* ruling retroactively, it is not surprising that the vast majority of Courts of Appeals which have confronted the issue have followed the

[1] The claims of the *DelCostello* plaintiffs arose in 1977 and 1978 and suits were instituted within seven and ten months respectively. *DelCostello*, 451 U.S. at 155-157, 172. Scaglione's case history is virtually indistinguishable: his cause of action arose no later than mid-May, 1977 and he did not file his complaint until December 29, 1977, over seven months later.

Supreme Court's lead and have imposed the six-month statute of limitations on litigants who commenced their cases prior to the *DelCostello* decision. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Graves* v. *Smith's Transfer*, 736 F.2d 819 (1st Cir. 1984); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir.) *cert. denied*, 105 S.Ct. 594 (1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.) *cert. denied*, 105 S.Ct. 512 (1984); *Lincoln* v. *District 9, International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 105 S.Ct. 292 (1984); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3d Cir. 1983); *Storck* v. *Teamsters*, 712 F.2d 1194 (7th Cir. 1983). Even those Circuits, the Ninth and the Fourth, which have not accepted retroactivity wholesale, have carved out potentially rule-swallowing exceptions to prospective-only application of *DelCostello*. *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 105 S.Ct. 292 (1984). No lower court, to the best of Union Respondent's knowledge, has endorsed Petitioner's suggestion that *DelCostello* should be applied retroactively to those claims which arose after April 20, 1981, but not to cases where the cause of action accrued before that date.

Finally, this Court has consistently rebuffed all requests for discretionary review of the retroactivity question, irrespective of whether the lower courts have adopted or rejected retroactive application. *Barnett*, *supra*; *Welyczko*, *supra*; *Rogers*, *supra*; *Murray*, *supra*; *Ernst* v. *Indiana Bell Telephone Company, Inc.*, 717 F.2d 1036 (7th Cir. 1983) *cert. denied*, 104 S.Ct. 707 (1984); *Edwards* v. *Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983) *cert. denied*, 104 S.Ct. 1599 (1984).

Despite Petitioner's protestations, his grounds for opposing *DelCostello's* retroactivity are not unique, nor does his case

present facts which compellingly distinguish it from the array of cases cited above. The main thrust of Petitioner's argument appears to be that he diligently pursued his complaint against the Union, and it would be inequitable to apply *DelCostello* to him because when he filed suit in 1977 there was no way to predict that a six-month limitation period would govern duty of fair representation actions.

Although Petitioner asserts that he relied on clear past precedent in waiting for over six months after his cause of action accrued to sue the Union, he can, of course, point to no Supreme Court ruling (which is the starting point of analysis under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 [1971]) on which he depended while delaying institution of his action. Indeed, in *International Union, United Auto Workers, Aerospace and Agricultural Implement Workers of America* v. *Hoosier Corp.*, 383 U.S. 696, 705 n.7 (1966) this Court specifically reserved on the question of the appropriate statute of limitations to be applied in cases of the instant sort.

Before *DelCostello* the lower courts were far from uniform as to the appropriate statute of limitations to be applied in hybrid breach of contract/breach of duty actions. Instead, the pre-*DelCostello* statute of limitations decisions were marked by uncertainty and conflict, as has been pointed out by several Courts of Appeals. *See, e.g. Lawson* v. *Truck Drivers*, 678 F.2d 250, 254 (6th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857-862 (5th Cir. 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581, 586 (3d Cir. 1983). In this confused context, any reliance plaintiff placed on appellate court decisions was clearly at his own risk, and does not entitle him to an exemption from the retroactive application of *DelCostello*.

Moreover, despite the fact that, pre-*DelCostello*, the Courts of Appeals were in conflict, the seeds of that decision were sown long before Petitioner's cause of action accrued. Even the concededly-foreshadowing case of *United Parcel Service* v.

Mitchell, 451 U.S. 56 (1981) did not represent a clean break with past precedent, but had its own genesis at least as early as 1976 in this Court's decision in *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976). *See Mitchell,* 451 U.S. at 61-62. In these circumstances, it can hardly be concluded that *DelCostello* represented the "abrupt and fundamental shift in doctrine" which is the prerequisite for prospective — only application. *Hanover Shoe* v. *United Machinery,* 392 U.S. 481, 498 (1968).

Thus, the premise of Petitioner's argument that he was justifiably taken by surprise by *Mitchell* and *DelCostello* is faulty on at least two counts: first, the lower court decisions in the statute of limitations area were in disarray, and, secondly, the Supreme Court had begun to lay the foundation for *DelCostello* at least a year prior to the accrual of Petitioner's cause of action. *Hines* v. *Anchor Motor Freight, supra.*

Finally, Scaglione's putative diligence in pursuing his claim does not withstand scrutiny. Although Scaglione filed suit in 1977, he inexplicably failed to serve the complaint on either defendant until April of 1979. Thus, his case languished for over fifteen months in the office of the Clerk of Court without any action being taken by Scaglione to pursue his claim. As a practical matter, the case "began" only in 1979 when the defendants were first given notice of Scaglione's claim. Had Scaglione in fact moved his case along with reasonable dispatch after filing the complaint, he may have avoided the statute of limitations problem he now faces. At any rate, given the inertia which characterized Scaglione's early pursuit of his claim, this is not the appropriate case in which to consider any limitation on the retroactivity of *DelCostello.*

C. *Miscellaneous Issues.*

In his statement of "Questions Presented," Petitioner lists for consideration four issues other than *DelCostello's* retroac-

tivity. Aside from the preliminary designation of these issues, however, nothing is mentioned in the Petition regarding these matters. In these circumstances, there would appear to be no basis for granting certiorari with respect to these undiscussed questions. *Cf.* Sup. Ct. R. 21.5. Accordingly, Respondent Union does not address these issues on the merits.

Conclusion.

The Petition for Certiorari should be denied.

Respectfully submitted,

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